



February 28, 1997

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

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FEB 28 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Notice of Proposed Rulemaking, MM Docket No. 95-176

Dear Mr. Caton:

The Satellite Broadcasting and Communications Association (SBCA) respectfully submits the attached comments for consideration in the above-captioned proceeding. Please find enclosed an original and eleven copies pursuant to the Commission's rules to be distributed to the appropriate parties.

Sincerely,

Andrew R. Paul
Senior Vice President

ARP/mh
Enclosures

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Satellite Broadcasting and Communications Association

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Closed Captioning and Video Description)
of Video Programming)
)
Implementation of Section 305 of the)
Telecommunications Act of 1996)
)
Video Program Accessibility)

MM Docket No. 95-176

COMMENTS OF
THE SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION OF AMERICA

Andrew R. Paul
Senior Vice President
Satellite Broadcasting and
Communications
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NOTICE OF PROPOSED RULEMAKING

**COMMENTS OF
THE SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION OF AMERICA**

The Satellite Broadcasting and Communications Association of America ("SBCA") is pleased to submit to the Commission its comments in the above referenced proceeding.* The SBCA has previously filed comments on this matter in the Commission's Notice of Inquiry in December, 1995. At that time, we expressed our concern over several issues raised in the NOI and which have been included in this NPRM. We will comment on them more extensively in this proceeding with a view of attempting to recommend the most efficient way in which the Commission can implement the closed captioning requirements imposed by the Telecommunications Act of 1996 while taking into consideration

*ASkyB and Echostar are not party to SBCA's comments.

the workings of the video market place. That issue, however, may be more complex than the Commission had originally envisioned, and we will attempt to point out those areas where the FCC's recommendations may not have the effect which it had contemplated.

In SBCA's original comments, we stated that DBS providers retransmit intact all material and information which is contained in a video program signal which is obtained from a programming service and distributed to home satellite subscribers. That includes the closed captioning information which is contained in Line 21 of the Vertical Blanking Interval for those programs which already are closed captioned. The DBS provider simply passes through whatever is already part of the program signal. There are no changes - although digital transmission clearly enhances the picture quality which is displayed on a DBS subscriber's television screen. Thus from the outset there is no issue over the ability of DBS providers to carry closed captioned programming. Nor is there question concerning the effect of DBS satellite transmission on the content of the signal being carried. There is none.

In any event, the DBS industry is interested in assisting the Commission in putting its closed captioning rules into effect in a timely and responsible fashion. However we fear that the manner in which the Commission is proposing to implement its regulations could create for providers a role which is not within the context of their normal or natural course of doing business.

I. INTRODUCTION

The SBCA is the national trade association of the Direct-To-Home satellite television industry ("DTH"). It is a vertically integrated organization which represents all components involved in the delivery of video programming to the home utilizing transmissions from satellites in orbit in conjunction with home receiving equipment. SBCA's membership comprises the manufacturers and lessors of satellites and transponders, the manufacturers and distributors of receiving equipment, the major DBS satellite service providers, the principal program services which offer their programming products to consumers on a subscription basis, and more than 2,500 retail satellite vendors who are the point of sale for consumers purchasing receiving systems and programming.

This proceeding, however, apparently proposes to designate responsibility for compliance with the new closed captioning rule to the satellite service providers. These are the principal DBS providers who offer private subscription program service to consumers through digital satellite transmissions, as well as the C-Band ("HSD") service which appears to be included in this NPRM as well. It is on these service providers that we will focus our comments.

II. RESPONSIBILITY FOR COMPLIANCE

In our previous comments in the Commission's NOI, SBCA stated that the burden for compliance should rest at the source of program production because that is the most efficient and least costly point of closed captioning within the

distribution chain of video programming. That remains our view, and we are recommending that the Commission re-examine its preliminary conclusion that video service providers should have the primary responsibility for the closed captioning of programming which they carry, but over which they usually have little control, particularly at the point of production.

The Commission itself appears to have some doubt as to the applicability of its conclusion as a practical market place approach to implementing its closed captioning rules. It appropriately cites the language of the House Report which clearly delineates the efficacy of captioning at the point of production.

Furthermore, by requesting comments on the "feasibility of having program owners *and* providers share responsibility for compliance,"¹ the Commission is expressing its own ambiguity as to the validity of assigning compliance responsibility to the service providers.

By assigning captioning responsibility to the service providers, particularly in the DBS industry, the Commission may be unwittingly opening the door to a new host of problems which it may not have envisaged in proposing these rules. In the first place, the Commission has assumed that DBS providers will use contractual delivery requirements, i.e., market place position, to insure that programmers close caption the programming they make available for DBS private subscription television. But irrespective of any contract requirements in

¹ NPRM, Paragraph 28, (emphasis supplied).

this regard, the Commission is indicating an intention to rely on the DBS providers to act as market place "watchdogs" for program creators who the Commission apparently fears may not abide by the proposed rules.

We believe that once the rules are in place, all responsible parties will comply in strict accordance with what the Commission will have laid down in this area and that the Commission may be mistaken if it assumes that program creators will ignore the new rules willy-nilly so that the DBS providers are needed to monitor the market place. The suggestion that DTH providers "enforce" the proposed closed captioning rules through contractual obligations in turn suggests that television program creators will fail to face the realities of surviving in an increasingly competitive video environment. The business of offering video program service to the public is difficult, expensive and complex if the viewer base is to be maximized. The market place itself will serve as a self-correcting mechanism where non-captioned programming simply will not be carried by service providers, and in turn will not survive. Thus any program creator who, on its own, makes a conscious decision not to close caption programming is making a decision to be shut out of the market place, contractual agreements notwithstanding.

We reiterate here that the role of the DBS operator is purely a mechanical one. The very factors program creators must consider to bring video programming to market dictate that the closed captioning must take place at the production point, or must be performed on location in the case of live events.

In that light, we recommend that the Commission reconsider its proposal on compliance by reflecting on the role of the provider in program distribution. It is inequitable to make entities which have little or no control over the program production phase subject to absolute compliance simply because they are the final party in the chain from production to viewing. They are not party to the production process. DBS providers would not relish the role of monitoring program creators for closed captioning because, in the end, their business is video distribution and not the processing of video techniques.

In addition, there are other issues relating to copyright and enforcement which could affect DBS providers in ways perhaps not foreseen by the Commission. For example, what would a provider's liability be if non-captioned programming inadvertently was included in a package supposedly designated as captioned? Would the Commission penalize the provider or the program creator? Does the Commission expect that providers will include indemnification agreements in their contracts if indeed they would be required as a practical matter to add such provisions if the rules take effect as proposed?

These are important issues, and many of them should be addressed by the Commission. They arise because of the unique position that DBS providers would hold if the new rules make them solely responsible for compliance. That would be hardly equitable. For example, the Commission noted the possibility of a program creator who, wishing to maintain creative control over a product, may not want to add closed captioning.² Or, certain live events may not lend themselves readily to closed captioning without significant cost. Should the service provider be held in non-compliance in situations such as these, should they ever occur? We think not.

As we have stated, the DBS data stream carries all information, without exception, that is contained in the programming and passes it through to the viewer, including information in the Vertical Blanking Interval. From a practical point of view, the administrative efforts of each DBS operator in monitoring programming and record keeping would be duplicative throughout the DBS industry. That would constitute a substantial waste of resources by each provider for practically identical functions, often dealing with the same programming. These questions arise only because the Commission has elected to insert DBS providers into the pivotal role of screening video programming for closed captioning in order to effectuate its proposed rules. We urge the Commission to give it another look.

² NPRM, Paragraph 87.

Therefore, the SBCA recommends that the Commission's new rules require the program creators to bear responsibility for complying with the closed captioning obligations. DBS providers simply pass through the program signal to subscribers. The relevant House Report language states the obvious: the point of production is the most logical place for the closed captioning process to occur. We agree. Program creators should be assigned full responsibility for its fulfillment.

III. SBCA URGES A FLEXIBLE TRANSITION PERIOD

Realistically, complying with a transition schedule is far more an issue for the program creators because they are the entities which either bear now, or will bear in the future, the cost for close captioning their program offerings. Thus they are in a far better position to weigh the merits and criteria for a staggered approach to implementing the requirements.

SBCA would urge the Commission, however, that whatever approach it adopts, it give program creators as much flexibility as is possible under the rules while keeping with the spirit of the statutory requirement. The Commission should be mindful that closed captioning can add significant cost to the production of programming; that there could be a shortage of captioning resources in view of the potentially large amount of material which would have to be processed; and that the Commission has acknowledged that there is limited availability of real-

time captioners which could become a critical factor in bringing live events under the proposed rules.

The Commission has stated that “virtually all nationally broadcast programming, both commercial and noncommercial, contains closed captions, including prime time television programming, children’s programming, news, daytime programming and some sports programming.”³ Thus, according to the Commission, a significant body of the programming which commands the greatest market share is already closed captioned and readily constitutes a base from which the Commission could further promulgate its rules. We believe that in the case of broadcast programming carried on DBS, that broadcasters who already buy or originate program material for national distribution on free, off-air television, have the primary responsibility to ensure that their material is closed captioned for all media through which their programming is distributed.

We disagree with the Commission, however, that DBS providers “are in a better position than the Commission to determine what should be captioned first.”⁴ To do so would require the provider to offer a subjective judgment concerning the desirability of captioning particular programming vis-a-vis another program service. That is not an appropriate function for a provider who proffers a subscription service to the public of multiple packages of diverse programming. Selecting programming for priority treatment is tantamount to rating that

³ NPRM, Paragraph 12.

programming, possibly to the detriment of other programmers being carried on the system.

Because satellite technology enables the transmission of an unaltered program signal with all of its attendant information, there is no question as to the ability of DBS providers to present to the public whatever a program producer has created. But we do not believe that for a provider to set program priorities, determine percentages of programming for closed captioning, or apply other related measurements or determinations constitutes good business. Those determinations are better left to other market place participants who will bear the initial economic burden of closed captioning the programming they create.

IV. LIBRARY PROGRAMMING

Library programming is clearly a facet of this rulemaking which could have significant economic impact on program owners and distributors. The NPRM states that about 24,000 previously released titles are not closed captioned. However there appears to be little information as to when these titles, many of them now old, are shown on television and during what period; who are the current owners or rights holders; and their appeal to general viewing audiences.

For example, the voluminous amount of films seems to indicate that perhaps the most popular have already been closed captioned for viewing either during

⁴ NPRM, Paragraph 42.

prime time or at other periods with high ratings. The lesser known titles, and those not presently closed captioned, may be better suited for late-night syndication or during periods when there is not significant television viewing demand.

In this regard, the Commission rightfully identifies the statutory requirement of “maximizing the accessibility” of the films in question, as compared to a requirement to close caption them.⁵ We would ask the Commission to define more precisely “maximizing accessibility” versus “requiring” it: is there an economic benefit to closed captioning of these titles with regard to the audience and time of display? “Requiring” captioning for late-night syndication runs may not be justified in view of the market returns for that period. We do not want to appear disinterested in the demands of viewers who would benefit from the closed captioning of these films. However a market judgment must exist by the distributor regarding the viability of showing this programming in light of an expected market return – certainly not an unreasonable view in a fiercely competitive market place.

Having said that, it is our view that until there is a more thorough determination as to the economic impact of requiring closed captioning of currently uncaptioned material, library programming should be exempted from the rules. The Commission should assess the economic impact of captioning library

⁵ NPRM, Paragraph 6, “Library Programming.”

material. We believe that those titles which will be in demand at peak viewing periods - even those not currently captioned - will be closed captioned by creators in order to appeal to the largest viewing audience possible. The Commission should investigate further how to best utilize the normal workings of the market place to fulfill its goals.

V. EXEMPTIONS FOR PROGRAMMING

Introduction

Many of the categories of programming for which the Commission seeks comments with regard to their possible eligibility for exemption from the requirements may not rightfully be within the realm of DBS services (or any service provider for that matter) to provide. We are being asked to comment on issues which have significant ramifications for program creators who will be the parties who perform closed captioning and to consumers who will ultimately bear the costs. In any event, there are several categories of programming which affect DBS providers directly because they employ these types of programming frequently on their systems.

1. Programming that is primarily textual in nature, interstitials and promotional programming⁶ are common categories employed by DBS services to provide subscribers with on-screen guides, announcements, promotions, and other types of material dealing with usage of the DBS system or future program

⁶ NPRM, Paragraphs 73 and 79.

offerings. For the most part, they represent material which has a short shelf life. They consist of program announcements, often with short film trailers, promotions of upcoming subscription events, so-called "barker channels," announcements of channel changes, or special instructions on using the DBS software. They are temporary for the most part in that they change often due to the specialized nature of the material being displayed and its transient usefulness.

Programming which is "textual in nature" is stand-alone, meaning it needs no further audio embellishment to be understood. On-screen guides, for example, are always "textual in nature" and obviously change daily in accordance with the programming schedule. Because of either the textual nature of the programming under consideration, or the short time period for which it is useful, the Commission has properly recognized that these classes should be exempt because the economic burden of closed captioning would produce little further benefit. For these same reasons, we agree.

2. Instructional programming⁷, particularly if it is locally produced and distributed, poses a significant difficulty for DBS distribution. The continental nature of a satellite footprint militates against its utilization for transmitting local programming, and presently no locally produced and distributed programming is

⁷ NPRM, Paragraph 76.

carried on DBS systems.⁸ Thus we urge the Commission to exempt these categories.⁹

Furthermore, intra-business communications or specialized programming for business groups or professional audiences such as automobile dealers, hospitals, retail chains or other organizations which have a need for point-to-multipoint information services should also be exempted. These constitute private use of satellite communications and typically consist of renting or leasing transponders for network applications. While they do not precisely fit the category of "instructional programming," this may be the appropriate place to raise the need for their exemption.

3. Music programming¹⁰ can be an integral part of a DBS service offering because providers often include audio channels in their program packages. The channels are formatted for background music and are audio only, not video. The usual technique is to broadcast the music with nothing visible on the television screen. The Commission also distinguishes between music videos where there is no text on the screen and background music "where the music is primarily instrumental." We concur that the latter falls within the classes to be exempted, and that the Commission take another look at exempting music video's too.

⁸ Political advertising referred to in NPRM Paragraph 80, and which is local in nature, is being dealt with in the Commission's proceeding on DBS public service obligations.

⁹ PEG access and leased access channels referred to in NPRM Paragraphs 74 and 75 apply to the cable industry but not to DBS.

4. Sports programming¹¹ is a category which, while widely popular, also raises certain issues which complicate an analysis with regard to closed captioning. The NPRM notes that "a significant amount of nationally distributed sports programming has been captioned voluntarily as has some regional sports programming."¹² We are not convinced that the closed captioning of live sports programming is as widespread as the Commission believes, but rather it could be limited.

Because sporting events are broadcast live, on-site captioning would be required to satisfy the rules. However the Commission must consider the fact that on a week-end there may be hundreds of sporting events around the country which could require on-site captioning. We do not know how many stenocaptioners would be needed in order to close caption all national and regionally televised athletic contests on a single day, given the small pool of stenocaptioners cited in the NPRM at about 100¹³. The Commission will have to consider the lead times needed to develop a larger pool of stenocaptioners, the number needed to cover events on any given day, and the economic benefits of covering regional and local sports events, given the captioning costs they entail and the size of viewing audiences.

¹⁰ NPRM, Paragraph 82.

¹¹ NPRM, Paragraph 84.

¹² Ibid.

¹³ NPRM, Paragraph 24, Comments by VITAC.

VI. LIABILITY FOR FAILURE TO COMPLY

We alluded briefly above to serious questions of liability on the part of DBS providers which would be placed squarely in their lap if they are given sole responsibility for compliance as proposed in this NPRM. An example cited earlier was the question of a program producer who wished to assert creative control over a product to the extent that closed captioning would not be permitted. While we can not envision such a circumstance, it could pose a serious problem for a DBS provider. Should such an instance arise, it would raise copyright issues which are beyond the ability of the service provider to resolve.

In a similar regard, a service provider has no control over the quality or accuracy of the closed captioning because that process has been included or added to the programming somewhere else in the distribution chain, i.e., at the point of production or program source. DBS operators transmit programming in the full and exact state in which it is sent to the satellite and then downlinked to subscribers' receiving systems. If the captioning has been inserted into the program material, it will be carried in the satellite data stream with no modification or changes in quality and accuracy. We would object strongly to being held responsible for ensuring that program creator and captioner performed their tasks adequately. That is the duty of the program creator, not

the service provider, and we urge the Commission to find a more suitable approach to this thorny issue.

We ask in concluding this section that the Commission reconsider the impact its proposal will have on DBS operators, particularly regarding closed captioning of programming as an issue of content. It is a matter totally out of the hands of the DBS service provider in that the full program material, including closed captioning, is passed through intact to the subscriber. It would be inequitable to place a monitoring responsibility together with an enforcement liability on the providers because the Commission will be asking them to perform functions which are outside their normal sphere of business operations. They would also be forced to incur significant costs to administer a monitoring program and commit the employees necessary to maintain records and respond to complaints which would conceivably come from a national audience base. SBCA and its member companies would be pleased to work with the Commission in discussing this situation further and working on more appropriate solutions to the Commission's concerns. However the proposed approach does not appear practical at the present time.

VII. SBCA ASSUMES C-BAND OPERATIONS ARE EXEMPT

SBCA assumes here that Congress intended for C-Band home satellite operations to be exempt from the closed captioning requirement because the basis on which the entities involved in C-Band program distribution - namely the

satellite transponder lessors and the program packagers - do not fit the Commission's model as "service providers" (referred to as "HSD") for the purposes of this NPRM. We explain why below.

C-Band program delivery and subscription service are performed on a much different basis than DBS. The latter is an integrated private subscription system whereby the consumer purchases or leases the receiving equipment proprietary to that service and subscribes to programming that the DBS provider has contracted for with third party program services. The provider also controls or owns the satellite(s) or transponders which are utilized to retransmit the programming to the subscriber's premises.

C-Band, on the other hand, is a confederation of program services, each of which have leased a transponder from a satellite operator for a fixed period of time. Consumers are required to purchase receiving systems, however the equipment is unique to a particular service and is capable of receiving all C-Band services - both subscription and in-the-clear - regardless from which satellite the transmissions are being made¹⁴. But subscribing to C-Band programming is vastly different than DBS. As the NPRM correctly identifies, there are numerous "program packagers" who, acting as marketing and sales agents for the various program services, offer diverse packages of programming to C-Band system owners for an annual subscription fee.

¹⁴ There are currently 22 satellites serving the C-Band home video market.

Neither the satellite operator nor the program packager meet the market place criteria which the Commission sets forth to establish responsibility for compliance. Satellite operators simply lease their transponders to programmers for a fee and have no direct contact with consumers in the signal distribution process. They do not make purchasing agreements as stipulated in Paragraph 28 of the NPRM. Neither do the program packagers. They are only third party marketing arms of the programmers with the sole power to sell subscriptions and authorize receiving systems for eligibility to received scrambled programming. The role of both of these entities is limited and attempting to insert either into the role of compliance would be beyond their proper station in the marketplace and would create the "significant difficulty and expense" burden discussed in Paragraph 89 et. seq. They have no integrated responsibility for program delivery, as each provides a different function within the video distribution chain, and no relationship exists between satellite operator and program packager.

VIII. ENFORCEMENT AND COMPLIANCE

The Commission's proposals for enforcement and compliance review appear wieldy, impractical and costly. Television broadcasters and cable operators are local entities which are accessible by the public in the communities they serve. There, people are able to view logs and files dealing with prescribed FCC standards on, say, public service and, closed captioning on the spot. No such convenience is available in the DBS world because a general satellite facility

serves a national audience and is not accessible by the ordinary person. While DBS operators could maintain files on compliance, distributing them to the public at large would constitute a significant economic and administrative burden.

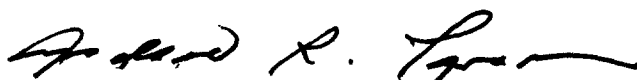
Finally, the waiver process for exemptions should be reworked to provide a faster track than the slower process petitioners typically undergo at the Commission. Because of program scheduling demands, costs of captioning, and the possible short life of programming, a fast procedure would be extremely helpful.

IX. SUMMARY

We have attempted in these comments to explain to the Commission the difficulties which would arise if the DBS providers are made solely responsible for compliance with the proposed closed captioning rules. Given the nature of the DBS business as a private subscription service which passes through to viewers what is contained in program signals, they would be given a complex assignment of monitoring the functions, quality and accuracy of the work of program creators. DBS providers have no control over the production process. This is not an appropriate role for them to play.

The SBCA however will work with the Commission in attempting to come up with a workable approach which does not create the burdens to DBS providers which we have described in our comments. We are interested in serving hearing

impaired viewers in the most practical way possible, and we will be pleased to develop a responsible approach which can satisfy the statute as well as the needs of the concerned parties.

A handwritten signature in black ink, appearing to read "Andrew R. Paul", written over a horizontal line.

**SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION**

Andrew R. Paul
Senior Vice President

February 28, 1997